

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26316
Docket Number CL-26026

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-9931) that:

1. Carrier violated the Agreement between the parties particularly but not limited to the October 27, 1977 Memorandum Agreement and the Master Agreement dated April 1, 1973, as amended, when on the dates of December 27, 28, 29, 30, and 31, 1982, and January 5, 10, 11, 12, 13 and 14, 1983, when Carrier diverted the clerk from a position reporting at 10:00 A.M. to Agent's position reporting at 7:00 A.M., at Princeton, West Virginia.

2. As a consequence of said violation Carrier shall be required to compensate the senior qualified employe for the Clerk's position 10:00 A.M., to 6:00 P.M., that was vacant account of the diversion for each of the specified dates at the applicable rate of pay."

OPINION OF BOARD: The relevant facts of this Claim are not in dispute. In October, 1982, Carrier abolished an Extra Board position which was used to relieve the Agent and Clerk to Agent at Princeton, West Virginia. On various dates in December, 1982, and January, 1983, Carrier instructed the incumbent of the Clerk to Agent position to divert from that assignment to the position of Agent, reporting at 7:00 A.M. instead of the 10:00 A.M. reporting time of his regular assignment. Carrier did not fill the Clerk to Agent position on these dates.

As a result, the Organization filed the instant Claim. Carrier rejected it. Upon the parties' failure to resolve the dispute on the property, the matter was advanced to this Board for adjudication.

The Organization contends that Carrier's action violates the Memorandum Agreement of October 26, 1977. It points out that Section 1(c) thereof requires the filling of temporary vacancies of less than thirty calendar days when:

"The Carrier elects to fill a vacancy by...
diversion of an employe from his regular
position."

Thus, the Organization submits that Carrier did not comply with Section 1(c) above. It seeks applicable compensation for the senior qualified employe for the Clerk's position on each of the Claim dates.

Carrier, on the other hand, maintains that the incumbent's regular position was not filled account there were no qualified employees available from the Extra Board or the Seniority Roster. Therefore, it asks that the Claim be rejected on this basis alone.

A review of the record evidence convinces the Board that the Claim must be sustained in part. Section 1(c) of the Memorandum Agreement dated October 27, 1977 is clear and unambiguous. It requires Carrier to fill positions whose incumbents are directed to temporary vacancies. It is undisputed that Clerk H. E. Scanland was diverted from his regular position on the Claim dates to the Clerk position account of vacation and sick leave usage by the incumbent. As such, Carrier did not comply with the express provisions of the Agreement under the facts of this case.

However, the record evidence also reveals that there was no qualified employee to fill Clerk Scanland's regular assignment. As Carrier noted in its letter of November 30, 1983,

"The record further shows that Mr. Scanland's regular assignment was not filled because there were no qualified employees available from the Extra Board or the Seniority Roster."

Given this lack of availability, Carrier cannot be held liable for any money damages. No qualified employee could have filled Clerk Scanland's regular assignment. As such, Carrier simply could not have filled that position. Therefore, while Carrier violated the Agreement, no monetary relief is appropriate. Accordingly, the Claim is sustained to this extent only.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

Award Number 26316
Docket Number CL-26026

Page 3

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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Peter - Executive Secretary

Dated at Chicago, Illinois, this 13th day of May 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26316, DOCKET CL-26026
(Referee Martin F. Scheinman)

The claim involved in Award 26316 was presented on behalf of the "senior qualified employee" because the Carrier diverted an employee from his assignment of clerk reporting at 7:00 a.m. to the position of Agent reporting at 10:00 a.m. and did not fill the resultant vacancy.

The Majority in its findings states:

"The Organization contends that Carrier's action violates the Memorandum Agreement of October 26, 1977. It points out that Section 1(c) thereof requires the filling of temporary vacancies of less than thirty calendar days when:

'The Carrier elects to fill a vacancy by ...
diversion of an employee from his regular
position.'"

and concludes on page 2 that:

"A review of the record evidence convinces the Board that the Claim must be sustained in part. Section 1(c) of the Memorandum Agreement dated October 27, 1977 is clear and unambiguous. It requires Carrier to fill positions whose incumbents are directed to temporary vacancies. It is undisputed that Clerk H. E. Scanland was diverted from his regular position on the claim dates to the Clerk position account of vacation and sick leave usage by the incumbent. As such, Carrier did not comply with the express provisions of the Agreement under the facts of this case."

The statement that Section 1(c) "...requires Carrier to fill positions where incumbents are diverted to temporary vacancies" is contrary to Awards 4 and 10 of PLB 1790 involving these same parties. Those Awards correctly held that the Carrier can blank an assignment when no qualified employees are available to cover a diverted employee's regularly assigned position.

Secondly, in Section 1(a) of the October 26, 1977 Memorandum Agreement, the Carrier and the Organization mutually agreed:

"Regularly assigned employees will not be diverted from their regular assignments to fill vacancies when other such qualified employees are available to fill such vacancies."

Neither the awards of PLB 1790 nor the applicable agreement supports the Majority's decision in this case; therefore, we are constrained to dissent to Award 26316.

James E. Yost
J. E. Yost

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

Michael C. Lesnik
M. C. Lesnik

P. V. Varga
P. V. Varga

